UNITED NATIONS

TD

United Nations Conference on Trade and Development

Distr.
GENERAL

TD/B/CN.4/GE.2/10
5 December 1995

Original : ENGLISH

Joint UNCTAD/IMO Intergovernmental Group
of Experts on Maritime Liens and
Mortgages and Related Subjects
9th session
Geneva, 2 December 1996

REPORT OF THE JOINT UNCTAD/IMO INTERGOVERNMENTAL GROUP OF EXPERTS ON MARITIME LIENS AND MORTGAGES AND RELATED SUBJECTS ON ITS EIGHTH SESSION

held at IMO Headquarters, London
from 9 to 10 October 1995

The attached report (JIGE(VIII)/7) */ has been prepared on the eighth session of the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects.

---

*/ Also circulated by IMO under the symbol LEG/MLM/37.

GE.95-54014

Distr.
GENERAL

JIGE (VIII)/7
8 November 1995

Original: ENGLISH

Joint Intergovernmental Group of Experts on Maritime Liens
and Mortgages and Related Subjects

Eighth session

London, 9 - 10 October 1995

REPORT OF THE JOINT INTERGOVERNMENTAL GROUP OF EXPERTS ON MARITIME LIENS AND MORTGAGES AND RELATED SUBJECTS ON ITS EIGHTH SESSION

CONTENTS

Chapter		Paragraphs
	Introduction	1 - 5
I	Consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952 (agenda item 3)	6 - 10
II	Organizational matters	11 - 21

Annexes

I Report on the work of the Sessional Group

II Report of the Chairman of the informal working group on article 1

INTRODUCTION

1 The Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (JIGE), established by the International Maritime Organization (IMO) and the United Nations Conference on Trade and Development (UNCTAD) held its eighth session at the International Maritime Organization, London, from 9 to 10 October 1995.

2 During the session, 2 plenary meetings and 4 informal meetings of the Sessional Group of the Whole were held. The present report reflects the proceedings at those meetings.

Opening statements

3 The Secretary-General of IMO, speaking on behalf of IMO and the Secretary-General of UNCTAD, welcomed the participants to the meeting and commended as a remarkable achievement the fact that at its last session in Geneva the JIGE had been able to agree to work on a basic text of a new Arrest Convention.

4 He also highlighted the importance of the co-operation between IMO and UNCTAD reflected in the field of maritime liens and mortgages. He stated that this co-operation should be seen as a demonstration of the strong commitment of both UN bodies towards the achievement of unification of international maritime law with regard to matters of paramount importance for the shipping community. This commitment would be truly successful if the treaties prepared by the JIGE became widely accepted.

5 In this regard, the Secretary-General stated that the conditions for the entry into force of the 1993 International Convention on Maritime Liens and Mortgages should be met as soon as possible. Governmental action in this regard would decisively complement work by the JIGE of a new Arrest Convention.

Chapter I

CONSIDERATION OF THE POSSIBLE REVIEW OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEA-GOING SHIPS, 1952

(Agenda item 3)

6 For its consideration of this item, the Joint Intergovernmental Group of Experts had before it the following documentation:

"Consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952" - Note by the Secretariats of IMO and UNCTAD (LEG/MLM/32-JIGE(VIII)/2-TD/B/CN.4/GE.2/5);

Submission by the International Association of Ports and Harbors (IAPH) (LEG/MLM/33-JIGE(VIII)/3-TD/B/CN.4/GE.2/6);

Submission by the International Chamber of Shipping (ICS) (LEG/MLM/34-JIGE(VIII)/4-TD/B/CN.4/GE.2/7);

Submission by the International Ship Suppliers Association (ISSA) (LEG/MLM/35-JIGE(VIII)/5-TD/B/CN.4/GE.2/8);

Submission by the Institute of International Container Lessors (IICL) (LEG/MLM/36-JIGE(VIII)/6-TD/B/CN.4/GE.2/9).

Consideration of agenda item 3 in the Sessional Group of the Whole

7 At its opening plenary, the Joint Intergovernmental Group decided to establish an informal Sessional Group of the Whole to consider agenda item 3.

8 The Sessional Group decided to adopt as a basic text for its deliberations a revised set of draft articles for a convention on arrest of ships prepared by the Secretariats of IMO and UNCTAD (JIGE VIII/2). The Group introduced several amendments to the draft and decided to revert to its consideration at its next session. A small working group was set up with the task of ensuring that all claims with maritime liens status under the 1993 MLM Convention are included in the list of maritime claims.

9 At its last meeting, on 12 October 1995, the Sessional Group of the Whole adopted its draft report to the plenary (JIGE (VIII)/WP.1).

Action by the Joint Intergovernmental Group of Experts

10 At its closing plenary, on 12 October 1995, the Joint Intergovernmental Group of Experts approved the report of the Sessional Group of the Whole and decided to annex the Sessional Group's report to its own report (see annex I below).

Chapter II

ORGANIZATIONAL MATTERS

A. Opening of the session

11 The eighth session of the Joint Intergovernmental Group of Experts was opened on 9 October 1995 by Mr. G.G. Ivanov (Russian Federation), Chairman of the Group at its seventh session.

B. Election of officers

(Agenda item 1)

12 At its opening plenary meeting, on 9 October 1995, the Joint Intergovernmental Group of Experts agreed that the officers for its eighth session would be the same as for its seventh session. The officers for the eighth session were thus as follows:

Chairman	Mr. G.G. Ivanov	(Russian Federation)
Vice-Chairmen:	Mr. I. Melo Ruiz	(Mexico)
	Mr. K.-J. Gombrii	(Norway)
Vice-Chairman cum-Rapporteur:	Mr. Zengjie Zhu	(China)

C. Adoption of the agenda and organization of work

(Agenda item 2)

13 At its opening plenary meeting, on 9 October 1995, the Joint Intergovernmental Group of Experts adopted its provisional agenda, as contained in document JIGE(VIII)/1-TD/B/CN.4/GE.2/4-LEG/MLM/31. The agenda for its eighth session was thus as follows:

1. Election of officers

2. Adoption of the agenda and organization of work

3. Consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952

4. Provisional agenda and date of the ninth session of the Joint Intergovernmental Group of Experts

5. Other business

6. Adoption of the report of the Joint Intergovernmental Group on its eighth session

14 Also at its opening plenary, the Joint Intergovernmental Group decided to establish an informal Sessional Group of the Whole to consider agenda item 3.

D. Membership and attendance

15 The following States Members of IMO and UNCTAD participated in the session: Argentina, Australia, Brazil, Canada, Chile, China, Cuba, Cyprus, the Democratic People's Republic of Korea, Denmark, Ecuador, Egypt, Finland, France, Gabon, Germany, Greece, Indonesia, Israel, Italy, Japan, Latvia, Liberia, Madagascar, Malaysia, Mauritius, Mexico, Morocco, Namibia, the Netherlands, Nigeria, Norway, Panama, Peru, Poland, the Republic of Korea, the Russian Federation, Saudi Arabia, Singapore, Solomon Islands, South Africa, Spain, Sweden, the Syrian Arab Republic, Tunisia, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Vanuatu and Venezuela.

16 An Associate Member of IMO, Hong Kong, participated in the session.

17 A representative of the INTERNATIONAL LABOUR ORGANIZATION participated in the session.

18 Observers from the following intergovernmental organizations participated in the session:

COMMISSION OF THE EUROPEAN COMMUNITY
LEAGUE OF ARAB STATES

19 The following non-governmental organizations were represented at the session:

INTERNATIONAL CHAMBER OF SHIPPING
INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS
INTERNATIONAL MARITIME COMMITTEE
INTERNATIONAL ASSOCIATION OF PORTS AND HARBORS
INTERNATIONAL ASSOCIATION OF CLASSIFICATION SOCIETIES
INTERNATIONAL CARGO HANDLING CO-ORDINATION ASSOCIATION
OIL COMPANIES INTERNATIONAL MARINE FORUM
INSTITUTE OF INTERNATIONAL CONTAINER LESSORS
INTERNATIONAL ASSOCIATION OF DRY CARGO SHIPOWNERS
INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES
INTERNATIONAL SHIP SUPPLIERS ASSOCIATION
IBEROAMERICAN INSTITUTE OF MARITIME LAW
THE FEDERATION OF NATIONAL ASSOCIATIONS OF SHIP BROKERS AND AGENTS

E. Provisional agenda and date of the ninth session of the Joint Intergovernmental Group of Experts

(Agenda item 4)

20 At its closing plenary, on 12 October 1995, the Joint Intergovernmental Group of Experts was informed that its ninth session, which would take place in Geneva, would be held from 2 to 6 December 1996. The provisional agenda will be submitted for its consideration and approval at the ninth session.

F. Adoption of the report of the Joint Intergovernmental Group on its eighth session

(Agenda item 6)

21 At its closing session, on 12 October 1995, the Joint Intergovernmental Group of Experts adopted its draft report (JIGE (VIII)/WP 1) and authorized the Secretariat to complete the final text in order to reflect the proceedings of the closing plenary.

Annex I

REPORT ON THE WORK OF THE SESSIONAL GROUP OF THE JOINT UNCTAD/IMO INTERGOVERNMENTAL GROUP OF EXPERTS ON MARITIME LIENS AND MORTGAGES AND RELATED SUBJECTS AT ITS EIGHTH SESSION

Item 3 Consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952

1 The Sessional Group discussed extensively whether the 1952 Convention or the draft articles for a new convention for arrest of ships prepared by the Secretariat should be considered as the basic text for its deliberations.

2 Some delegations favoured using the 1952 Arrest Convention as the basic text. In their opinion it provided legal certainty regarding the conditions for arrest of ships. This was particularly important in connection with the definition of maritime claims to be secured by arrest. In their view the closed list system regulated in the 1952 Convention ensured that procedures of arrest were limited to claims properly defined. The alternative of an open list, such as the one established by the draft articles prepared by the Secretariat on the basis of the CMI Lisbon text, would introduce uncertainty and could become the source of disputes as to whether a specific maritime claim could be subject to arrest. Moreover, it was stated that the reference to national law in article 3, paragraph 3, and article 6 of the draft, would not contribute to any further unification. The view was also expressed that in establishing a list of claims giving right to arrest, an equitable balance between the interest of the major and the small creditors should be maintained.

3 These delegations were of the view that in principle, the scope of revision of the 1952 Convention should be restricted to the introduction of amendments consequential upon the adoption of the 1993 International Convention on Maritime Liens and Mortgages and minor adjustments to take account of other developments since the adoption of the 1952 Convention. The view was expressed that, in the light of the 1993 MLM Convention, no changes to the 1952 Arrest Convention were necessary. If, however, other changes were to be considered necessary, they should be kept to a minimum. Bearing in mind the wide international acceptance of the 1952 Convention, it was essential not to go too far in its revision so as to avoid undermining the unification achieved through the Convention.

4 The vast majority of delegations, however, were in favour of using the draft articles prepared by the Secretariat at the request by the Group at its VIIth session as the basis for its further deliberations. In their opinion, the considerations in connection with the possible up-dating of the 1952 Arrest Convention in the light of the 1993 Convention on Maritime Liens and Mortgages provided an excellent opportunity to undertake a general review of the 1952 Convention. This had been the background for the request by the 1993 Diplomatic Conference to reconvene the JIGE. A general review would enable the Group to take stock of many years of international experience of application of the 1952 Convention to repair some deficiencies in the present system and to consider some further amendments which had prevented certain countries from becoming parties to the Convention. This could be done without deviating from the basic principles established by the 1952 Convention.

5 In response to those advocating a closed list it was suggested that an open list was to be preferred; it allowed claims to be secured which, while not specifically addressed in the open list, were beyond doubt of a maritime nature such as claims for unpaid insurance premiums, agency fees and stevedoring charges. An open list would furthermore provide flexibility for future developments in this regard.

6 In the view of one delegation an open list would provide uncertainty rather than flexibility for future developments.

7 After further discussions the Group decided to use the draft articles prepared by the Secretariat as the basis for its deliberations.

8 Several comments were made in connection with the format of the instrument to be finally agreed upon by the Group. The alternative for a new convention rather than a protocol amending the present 1952 Convention was considered advisable, bearing in mind the comprehensive character of the review and the procedures to be accomplished for adoption of the new treaty by a Conference convened by the United Nations and IMO. The draft articles prepared by the Secretariat would provide the substantive contents of the new treaty and the Preamble and Final Clauses would be prepared as appropriate, bearing in mind the usual procedures involved in treaty making preparatory work.

9 Several delegations made reference to discrepancies between the English text of the draft articles and texts in other languages. These delegations were invited to submit their comments or proposals in writing to the Secretariat, in order to ensure that the texts in all languages reflected the same substantive meaning.

10 Bearing in mind its preliminary discussions and the decisions adopted at its last session, the Group started to consider the revised set of draft articles contained in document JIGE(VIII)/2.

Article 1 Definitions

Paragraph 1

11 The Sessional Group considered the proposal put forward by the International Chamber of Shipping (ICS) to delete the words **"such as"** in the chapeau of article 1 in order to avoid creating an open-ended list of maritime claims so as to keep arrest as an exceptional measure to be used only as a last resort to secure a maritime claim. Some delegations which favoured the approach adopted by the 1952 Convention supported this proposal. It was argued that having a closed list of maritime claims provided certainty as to the exercise of right of arrest. In that connection concern was expressed that the words **"such as"** would be interpreted differently in various jurisdictions. Most delegations, however, preferred an open-ended list of maritime claims so as to retain flexibility and avoid excluding genuine maritime claims from having right of arrest. It was at the same time noted that the present draft text, although open-ended, restricted the power of arrest to types of claims similar to those listed within article 1(1). In response, the observer for the ICS pointed out that although in common law countries the principle of ***ejusdem generis*** would probably apply, this would possibly not be the case in all civil law countries.

12 The observer for the International Union for Conservation of Nature and Natural Resources (IUCN) drew attention to the fact that environmental claims, such as costs for the restoration of the environment, did not fit in the categories of listed maritime claims. His delegation would therefore prefer to retain the open-ended approach in the present draft.

13 In view of the above, the Sessional Committee decided to retain the words **"such as"** in the chapeau.

14 One delegation questioned the purpose of using the words **"concerning or arising out of"** and **"out of"** in the chapeau. The observer for the CMI explained that the wording was mistakenly abbreviated and the intention was to express the same thing in the second and third lines of the chapeau by repeating **"concerning or arising out of"**. The question was considered to be a matter of drafting. Some delegations questioned whether the use of the words **"salvage operations"** in the chapeau and **"salvage operations and any salvage agreement"** in sub-paragraph (c) was repetitive.

15 The majority of delegations agreed that the claims giving rise to a maritime lien under the 1993 Convention on Maritime Liens and Mortgages should be included among the claims listed in article 1(1). It was, however, pointed out that merely aligning terminology with the 1993 MLM Convention could result in creating contradiction between various sub-paragraphs of article 1(1), as was the case with sub-paragraphs (a) and (h). It was therefore suggested that the words **"other than loss of or damage to cargo"** in sub-paragraph (a) be deleted. Other delegations proposed the deletion of the word **"physical"** at the beginning of sub-paragraph (a) so as to include also economic and consequential loss. Some delegations, however, preferred to retain the word **"physical"**. One delegation doubted whether it was necessary to have any link at all between the MLM and Arrest Conventions. In response it was explained that linkage between the two Conventions was necessary to the extent that all maritime liens covered in the MLM Convention needed to be included in the list of maritime claims in the Arrest Convention. In other words, linkage referred to the wording and not to the Conventions. The two Conventions should remain entirely independent.

16 One delegation proposed the inclusion of a reference to **"in direct connection with the operation of the ship"** in sub-paragraph (d) in the same way as in sub-paragraph (b), so as to exclude claims not related to the operation of the vessel.

17 The observer for the Institute of International Container Lessors (IICL) favoured the present text of sub-paragraph (1) provided that it was not taken to mean that containers had to be supplied to a particular ship.

18 Some delegations proposed the establishment of a small informal working group entrusted with the task of ensuring that all claims with maritime liens status under the 1993 MLM Convention are included in the list of maritime claims without creating duplication or contradiction and also to ensure that there was no conflict between various sub-paragraphs of article 1(1). One delegation stated that while sub-paragraphs (b) and (o) could be retained as they are presently drafted, other subparagraphs such as (a) and (h), as well as (k) and (n), need to be adjusted.

19 The Sessional Group agreed to set up an informal working group with the task of carrying out the work.

20 At the end of the session the Chairman of the working group reported to the Sessional Group that the working group had met twice and considered various proposals. The group had prepared new wording for sub-paragraphs (a), (b) and (d) which will be submitted to the plenary session. The working group could not conclude its work and would be prepared to continue consideration of the matter at the next session of the JIGE. The report of the Chairman is attached to the report of the Joint Intergovernmental Group at annex II.

Paragraph 2

21 Several comments and proposals were made in connection with the definition of arrest. It was noted that the definition in the basic text substantially differed from the one contained in the 1952 Convention in that the latter did not include the requirement that the ship is physically within the jurisdiction of the State where the order of arrest has been made. In this regard, it was explained that the purpose of the inclusion of this requirement was to distinguish physical arrest from the so-called documentary arrest, which refers to the registration of arrest in the ships' registry. Some delegations were of the opinion that this restriction should be considered in connection with the recognition of judicial orders; other delegations suggested that this provision should be placed in article 8; otherwise the requirement of the physical presence of the ship in the definition of arrest would affect the implementation of several articles of the Convention. These delegations favoured the inclusion of the definition of the 1952 Convention instead of the one in the basic text.

22 One delegation suggested that if the definition in the 1952 Convention were to attract thepreference of the Sessional Group, the second part contained in the present text should be retained. This delegation proposed that new language should be added securing that arrest can be ordered in cases where there is a real risk for the alleged claim not to be satisfied.

23 Other delegations were of the view that the physical presence of the ship in the jurisdiction of the State where the arrest order has been made should be considered as an enforcement requirement inherent in the concept of arrest. Accordingly, it should be included within the definition.

24 It was suggested that the expression **"where the order has been made"** could be replaced by **"where the arrest is effected"**. In this way, if the ship was not physically under the jurisdiction of a Court issuing an arrest order, it would nevertheless be clear that the arrest would be enforced only under the authority of the Court in the jurisdiction where the ship is physically present.

25 One delegation suggested that the term **"judgement"** be preferred to that of **"order"**, so as to make clear that the defendant would have the benefit of appearing in Court to contest the request for arrest. This view was opposed by several delegations on the grounds that circumstances of arrest frequently do not permit the delay caused by the procedures leading to a judgement. It was stated that judicial guarantees were implied by the fact that the order should be issued by a Court. Some delegations favoured the use of the expression **"judicial process"** as used in the 1952 Convention.

26 In response to comments by several delegations it was noted that the preventative character of arrest, as opposed to the seizure for the execution of a judgement, was clearly reflected in the definition of arrest. It was also noted that any reference to this preventative character specifically attached to the expression of **"arrest"** in languages other than English was a question of terminology only to be considered in connection with the texts in those languages.

27 The Group decided to revert to the definition of arrest contained in article 1, paragraph 2 of the 1952 Convention.

Paragraph 3

28 In response to a question from one delegation, it was indicated that the expression **"unincorporated associations"** intended to cover cases of companies which, although not incorporated, were considered legal entities in accordance with the national law in some countries.

Paragraph 5

29 It was noted that the main purpose of the introduction of the definition of "Court" was to indicate that arrest could only be ordered by a competent judicial authority.

30 The Group decided to revert to the consideration of this article at a later stage of its discussions.

Article 2 Powers of arrest

Paragraph 1

31 It was noted that the expression **"by or under"** the authority of a Court had been introduced to cover arrest effected by Court Officers as well as by other authorities in charge of executing a Court order of arrest. The opinion was also expressed that an arrested vessel should be released following an agreement of the parties involved, to that effect.

32 Some delegations were in favour of the formulation contained in article 4 of the 1952 Convention, which avoided the expression **"is demanded"** contained in this paragraph. It was noted that this expression reappeared in article 2 paragraph 5 but was omitted in article 6, paragraph 2 and article 7, paragraph 1, 2, and 3 of the basic draft. It was suggested that this expression might have been used to refer to situations where an application for arrest was made but not granted because security was deposited before the arrest took place.

Paragraph 2

33 A proposal was made to include the expression **"only"** after the word **"may"** (as in article 4 of the 1952 Convention). It was also suggested that the expression **"but in respect of no other claim"** could be deleted. The latter proposal was objected to by several delegations. In this connection, reference was made to the English version of article 2 of the 1952 Convention that contained the same words.

Paragraph 3

34 The Observer delegation of ICS introduced its submission that it might be impractical or dangerous to arrest a ship which **"is sailing"** and accordingly this expression should be deleted.

35 This proposal was supported by some delegations. The majority of delegations, however, were against this proposal on grounds that their national legislation as well as International Law, specifically the United Nations Convention on the Law of the Sea, enabled States to arrest a ship in connection with civil law cases as long as the ship was in their territorial jurisdiction, including the right of hot pursuit, and a valid order for the arrest could be produced.

36 One delegation cautioned against mixing private law issues such as arrest with situations clearly under the scope of public law. In this regard it was stated that the limits to the power of a Court to arrest ships were clearly established in paragraph 2 and related to the nature of the claims rather than the situation of the ship. The view was also expressed that claimants should not be encouraged to apply for an arrest at the last moment, thus creating extreme difficulties and unnecessary expense.

37 A number of comments were made regarding the proper meaning of the expression **"is sailing"**. It could be seen as offering a rather wide scope of application in that it could cover situations as different as that of a ship already unmoored and ready to sail or taken in tow inside the harbour or a ship already sailing.

Paragraph 4

38 Although the Group found that this provision was in principle acceptable, proposals were made to clarify the meaning of the expression **"for the purpose of obtaining security"** or to delete those words, since that expression was already used in article 1, paragraph 2.

Paragraph 5

39 One delegation suggested that although procedures leading to arrest should be regulated by national law, it was important that a new convention established an obligation for the claimant to notify the shipowner of the nature and amount of the claim. This proposal was not supported.

40 The observer delegation of IAPH referred to the observations made in its submission. The delegation stated that since the effective arrest of a ship could only take place in a port, the implications for ports of the arrest should be clearly addressed. Port authorities could be unable to exploit for months the space of berth in which the arrested ship is moored. They were also compelled to take measures to ensure safety and the protection of the marine environment. In order to ensure that port interests were adequately protected, a new paragraph under article 2 could be included, which would stipulate that port authorities should be involved in the proceedings leading to arrest. The new provision could also provide that the claimant would have to deposit a financial guarantee to cover for port costs.

41 Several delegations expressed their support to the need of protecting legitimate interests of ports vis-a-vis the enforcement of arrest procedures. In this regard, it was suggested that the interests of port authorities be safeguarded, particularly when the period between the arrest and judgement phases is long. It was also proposed that suitable provisions be included in article 2(5) on the procedures to be effected during the period of arrest.

42 However, most delegations stated their opposition to the proposed new paragraph. In their view reasons of expediency in the pursuance of maritime claims made unpractical the involvement of port authorities in arrest procedures. The deposit of a guarantee with the port authorities to cover for costs incurred by port authorities would mean a financial burden for the claimant in addition to any eventual advance payment required in some jurisdictions as a precondition for the enforcement of the arrest.

43 The Group decided to revert to the consideration of this article at a later stage of its discussions.

Article 3 Exercise of right of arrest

44 The Sessional Group had before it three alternative texts related to the exercise of the right of arrest irrespective of the personal liability of the owner. Alternative one permitted such an arrest for claims secured by maritime liens listed in article 4 of the MLM Convention. Alternative 2, which had been proposed by the delegation of the United States of America, also covered national liens granted under article 6 of the MLM Convention. Alternative 3, which had been proposed by the Chairman of the Informal Group on consideration of national maritime liens set up during the VIIth session, in addition to maritime liens set out in article 4 of the MLM Convention, also permitted arrest in respect of a claim secured by a maritime lien granted by the law of the state where the arrest is requested in accordance with article 6 of the MLM Convention.

45 The delegation of the United States of America emphasized that the success of both the MLM Convention and the Revised Arrest Convention depended to a large extent on resolution of this matter. In its view the difficulty arose because the MLM Convention did not specifically address the choice of law rule to be applied in deciding the effect to be given to national maritime liens. In the view of this delegation alternative 2 was the only alternative which fully implemented the compromise adopted regarding article 6 of the MLM Convention which provided shorter life spans for national maritime liens especially following the sale of a vessel. If such liens were not recognised internationally by State Parties to the Arrest Convention, then article 6 of the MLM Convention would be rendered meaningless.

46 Its delegation offered as a possible compromise another alternative based on alternative 3 to read as follows:

"**Article 3(1)**

(a) ... (no change from Alternative 1);
(b) the claim is secured by a maritime lien recognized by the law of the State where the arrest is requested;
(b) - (d) ... (reordered as (c) - (e) with no change)".

47 It was stated that the proposal did not impose any obligation on States to recognize maritime liens beyond what was permitted by their domestic law. It was left to the applicable law in the jurisdiction where the arrest is requested to determine if a maritime lien existed. Furthermore, reference to article 6 of the MLM Convention had been removed, because it was felt that the prospective arrest convention should stand on its own.

48 Some delegations considered that the proposal contained positive elements but needed further examination at the next session. Some other delegations felt that alternative 2 as referred to by the delegation of the United States of America was contrary to the compromise adopted by article 6 of the MLM Convention. As compared to alternative 2, the proposal now introduced by the United States of America was considered to be a step in the right direction. In keeping with the said compromise, the proposal did not imply an obligation on a State Party to the MLM Convention to recognise national maritime liens and would not place an obligation to do so on a State Party to the Revised Arrest Convention. However, a choice of law rule in the proposed form would lead to forum shopping and thus defy the object of the MLM Convention.

49 Many delegations favoured the text of alternative 1, but expressed their readiness to consider the other alternatives to see if they could form the basis for a compromise. One delegation which felt that the problem was caused by having an open-ended list of maritime claims in article 1 preferred to have a closed list of maritime claims in article 1 and keep flexibility in article 3. In the view of this delegation there were problems also with regard to the structure of article 3, and noted, for instance, that the key provision was given only in paragraph (1)(d)(i).

50 One delegation stated that the sole purpose of article 3 should be to supplement other provisions by allowing arrest of any ship for claims secured by a maritime lien if it was not owned by the person liable. This delegation proposed the following text for article 3: **"Arrest is also permissible of any ship for the purpose of enforcing a lien securing a maritime claim indicated in article 1(1)."**

51 The observer for the International Ship Suppliers Association (ISSA) expressed a view that the present text of article 3, even if accepted on the basis of any of the three alternatives in the present draft, may deprive a ship supplier of the right to arrest a ship which has not paid for supplies. Where there was no maritime lien and the supply was not to the shipowner or to the demise charterer but, for example, to a time charterer who did not own a ship, the ship supplier could not effect an arrest under article 3 of either the ship to which the supply was furnished or a sister ship. Nor did this article assist a ship supplier when the owner at the time of the supply was not the same as at the time of the arrest. This was considered a lacunae and a radical departure from the 1952 Convention.

52 The observer for the Federation of National Associations of Ship Brokers and Agents (FONASBA) stated that it would support the proposal of the ISSA if the proposal of the United States of America is not adopted.

53 The Sessional Group agreed to continue its examination of article 3 at the next session.

Article 4 Release from arrest

Paragraph (1)

54 A proposal was made to include, in paragraph 1 of article 4, other cases where the vessel can be released as in case of extinction of claim or lapse of time for commencing substantive proceeding, etc. While the proposal received some support, most delegations were cautious in establishing an exhaustive list to that effect. It was pointed out that paragraph (1) was not restrictive and covered other cases of possible release. Furthermore it would be difficult to provide an exhaustive list of cases where the vessel can be released. However, one delegation favoured adopting language which would permit release only upon payment also of custody costs.

55 The observer for the International Chamber of Shipping (ICS) expressed concern regarding the use of the term **"satisfactory form"** which did not exist in the 1952 Arrest Convention. It was explained that the words had been added so as to permit the court which decides on release to decide also on the satisfactory form of security.

56 In view of the above the Sessional Group agreed to retain the text of article 4(1) as presently drafted.

Paragraph (2)

57 One delegation proposed to delete the words **"not exceeding the value of the ship"** from paragraph (2). It was argued that, as the security was fixed on the basis of the amount of the claim, arrest could not be limited to the value of the ship. Furthermore, the words did not exist in the 1952 Convention. Alternatively, this delegation proposed to add after **"thereof"** a semicolon and to replace the words in question by the words **"if the arrest is limited to the ship, the security shall not exceed the value of the ship."**

58 The proposal received some support, but the majority of delegations were in favour of retaining the text as drafted. It was pointed out that since the security was a substitute for the ship, it could not exceed the value of the ship. It was further explained that the arrest under the Convention was for a maritime claim on the ship, therefore security had to be limited to the value of the ship.

59 The Sessional Group, therefore, agreed to keep the present text of article 4(2).

60 The observer for the Iberoamerican Institute of Maritime Law (IIDM) questioned whether the term **"In the absence of agreement between the parties"** was intended as a pre-condition for a recourse to the court. It was explained that there was no such intention and the paragraph could be reworded so as to avoid any ambiguity, for example by using the words **"unless parties have agreed."**

Paragraph 3

61 Two delegations questioned whether the text of this paragraph could not be misinterpreted as implying acknowledgment of the shipowner's liability. In response, it was noted that the deposit of a security was clearly related to the characterization of arrest as a conservatory measure. This conservatory character meant that the deposit of a security to obtain release from arrest could not be interpreted as an acknowledgment of liability or as prejudicing any consideration related to the shipowner's liability in connection with the claim which led to the arrest of the ship.

Paragraph 4

62 It was noted that the expression **"unjust"** in sub-paragraph (a) was not appropriate treaty language due to its imprecise meaning. It was also suggested that the whole reference to **"exceptional cases"** in which it would be unjust to release the security should be deleted.

63 One delegation suggested that an additional provision should be added to the effect of relating the upper limits of the limitation fund established to cover for the liability of the shipowner to the limits of the security to be requested to release the ship.

Paragraph 5

64 No comments were made in connection with this paragraph.

65 The Group decided to revert to this article at a later stage.

Closure

66 The Group decided to continue with the consideration of the draft articles at its next session.

67 The Chairman urged delegations wishing to introduce amendments to the draft articles to submit their written proposals well in advance of the next session of the Group and not later than 1 June 1996 to enable these proposals to be circulated to other delegations prior to that session.

***

ANNEX II

REPORT OF THE CHAIRMAN OF THE INFORMAL WORKING GROUP ON ARTICLE 1

Pursuant to the direction of the Joint Intergovernmental Group of Experts, an informal Working Group convened to consider issues relating to the definition of "maritime claim" under article 1, definitions of the revised draft articles for a Convention on Arrest of Ships (LEG/MLM/32). The Committee directed the Group to consider the draft of paragraph 1 of article 1 and to take into account the necessity of being compatible with the provisions of the 1993 MLM Convention, bearing in mind that repetitions should be avoided.

The Working Group met from 9 to 10 October 1995. Mr. P. Calmon Filho (Brazil) was unanimously elected as Chairman. Delegations from Brazil, Canada, China, France, Germany, Greece, Italy, Liberia, Mexico, Netherlands, Norway, Poland, the Russian Federation and Spain were represented.

1 The Group considered whether to add a sub-paragraph or paragraph under article 1, containing a precise reference to the Maritime Liens and Mortgages Convention 1993, in order to make it clear that maritime claims secured by a lien under the 1993 MLM Convention would fall within the scope of article 1.

2 The Group did not reach a decision and concluded that the matter should be further discussed particularly in connection with article 3.

3 As to the wording of clause 1, the Group took into consideration the various proposals presented in the plenary and agreed, in principle, with the following:

4 Chapeau: To add "concerning or arising" after "any ship, or", at the 2nd line, and to delete what comes after "on any ship" in the 3rd line. So the text reads as follows:

> "Maritime claim" means any claim concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or concerning or arising out of a mortgage or an "hypotheque" or a registrable charge of the same nature on any ship, such as any claim in respect of:

5 Item (a): Delete "physical" from the beginning of the sentence, and what comes after "operation of the ship" in the first line, so the text reads as follows:

> "loss or damage caused by the operation of the ship;"

The question had been raised as to whether it would be sufficient to follow the 1952 Arrest Convention text, and to delete the word "loss or". It was felt that this has to be decided by the plenary.

6 Item (b): Delete "direct" in the first line. So it reads as follows:

> "loss of life or personal injury occurring, whether on land or on water, in connection with the operation of the ship;"

The Group considered that in this way the text of the sub-paragraph would be consistent with the chapeau and with the 1952 Convention, which does not have the restrictive word "direct".

7 Item (d). There was no time to conclude the discussions. At the time the meeting was adjourned it was agreed in principle (except for the final phrase) that the following wording replace the present (d) on the draft:

"Preventive measures, the removal or attempted removal of a threat of damage or similar operations **if the aim was to mitigate a maritime claim**."

As to the last words (underlined) there was no agreement. One delegation proposed to replace "to mitigate a maritime claim", with "similar operations **in connection with the operation of the ship**."

8 The Group further agreed that this issue should be discussed further.

9 Some delegates had reservations on issues of substance and it was agreed that the participation in and the result of the work of the Working Group is without prejudice to the positions sustained by these delegations in the plenary.